In the

# SUPREME COURT OF THE UNITED STATES

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ANCHOR OIL COMPANY, a Corporation,
*Appellant*

vs.

W. H. GRAY, F. D. McDONNELL, CHARLES EGAN, F. C. GIBBONS, and THE GULF PIPE LINE COMPANY, a Corporation,
*Appellees.*

No. 188

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF ON BEHALF OF APPELLANT

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JOHN DAVENPORT,
*Counsel for Appellant*

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## INDEX TO CASES

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vs.

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No. 575

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## APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## BRIEF ON BEHALF OF APPELLANT

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### STATEMENT OF THE CASE

This is a suit in equity, instituted by the Appellant, Anchor Oil Company, a Corporation, against the Appellees, W. H. Gray, F. D. McDonnell, Charles Egan, F. C. Giddings, and The Gulf Pipe Line Company, a Corporation, in the Superior Court of Tulsa County, State of Oklahoma, affecting title and ownership of the oil and gas mining leasehold estate in and to a certain Creek Indian allotment, situated in said Tulsa County, Oklahoma. On the petition of the Appellees, the case was removed to the District Court of the United States for the Eastern District of Oklahoma, after which the Appellees filed their Motion to Dismiss.

Upon the hearing of said motion, the same was by the said District Court sustained and final decree entered in that Court on the 19th day of Februay, A. D., 1918, dismissing plaintiff's petition.

Thereafter the said District Court allowed the plaintiff an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and plaintiff's appeal was duly and properly lodged in that Court. On hearing in the said Circuit Court of Appeals the judgment and decree of the District Court was affirmed.

The cause is now here for review on appeal from the judgment and decree of the said Circuit Court of Appeals affirming the judgment of the said District Court.

## ABSTRACT OF APPELLANT'S PETITION

The particular allegation of facts contained in Appellant's petition necessary to consider in this discussion, is as follows, to-wit:

The lands in question were duly allotted by the Department of the Interior of the United States, to one Jennie Samuels, a full-blood adult citizen of the Creek Tribe or Nation of Indians, as her distributive share of the lands of said Tribe. On December 5, 1914, the allottee executed an oil and gas mining lease on the forms prescribed by the Department of Interior in such cases, to the Appellees, McDonnell and Egan. Subsequently the other Appellees acquired by contract with McDonnell and Egan, respective interests in said alleged oil and gas mining lease. This Departmental lease was filed for approval or rejection by the Secretary of the Interior, with the Superintendent for the Five Civilized Tribes, at Muskogee, Oklahoma, on January 5, 1915. Under date of October 21, 1915, the Assistant Secretary of the Interior at Washington, D. C., noted his approval in writing of said Departmental oil and gas mining lease. Prior thereto, however, to-wit: under date of

October 11, 1915, the allottee, Jennie Samuels, died intestate, in and while a resident of Creek County, Oklahoma, leaving as her heirs Feney Rogers, nee Sarkachee, and Lina White, formerly Lina Lowe, nee Billie, both of whom were likewise citizens of the Creek Tribe or Nation of Indians of the full blood.

It is further alleged in the petition, that in the month of December, 1915, these heirs, who were then the owners and holders of the fee simple title in and to said property by inheritance, under proper orders of the County Court, of Oklahoma, having jurisdiction of the estate of said decedent, as provided by section 9 of the Act of Congress of May 27, 1908, did make, execute and deliver their certain respective oil and gas mining leases covering said lands to one J. P. Williams, the Appellant acquired the title in and to the leases last above mentioned. The petition as shown in the transcript of the record derains the title of Appellant in detail and attaches copies of all instruments, orders and etc., in its chain of title.

It is further alleged in the petition and amendment thereto as shown in the record, that the Appellant and its assignors duly performed all of the terms, covenants and conditions to be by them done, kept and performed in accordance with the terms and stipulations contained in the oil and gas mining leases, so held and owned by Appellant, and had paid all rentals due thereunder; that before the Appellees entered upon said lands and commenced any drilling operations thereon under their purported Departmental oil and gas mining lease, they had full notice and knowledge of the claims and rights of the Appellant, in and to the same; and that under date of July 28, 1916, Appellant served written notice upon the Appellees of its rights, and claims in and to the premises, and further notified them not to enter upon said premises and not to carry on any drilling operations thereon. At this time and prior thereto,

it further appears that the chain of title under which the Appellant claimed, was duly filed for record in the office of the County Clerk, within and for Tulsa County, Oklahoma, same being the county in which said lands are situated, and that office being the recording office for land titles under the laws of the state of Oklahoma.

It further appears from the Departmental oil and gas mining lease claimed by the Appellees as shown in the record, that that instrument was not filed for record until August 10, 1916, which was long subsequent to the acquisition of the title to the premises by Appellant and its assignors.

The petition further alleges that Appellant had no actual knowledge or notice, at the time it acquired said interest in said lands, of the existence or of the execution of the said alleged Departmental oil and gas mining lease, and that Appellees, contrary to the notice served upon them by the Appellant, as aforesaid, and in utter disregard of the rights of the Appellant in and to the said lands and without the consent, notice or knowledge of Appellant, did obtain possession of said lands and commenced the drilling thereon for oil and gas mining purposes, in the course of which they discovered and produced petroleum oil and natural gas in large and paying quantities, to-wit: of the value of $100,000.00, and that they were continuing in the operation of said lands for oil and gas mining purposes and appropriating the production thereof to their own use at the time of the institution of said action.

The petition prays judgment enjoining the Appellees from interfering with the possession of Appellant in and to said lands, for the purpose of its said lease, quieting the title of the Appellant's oil and gas leasehold estate therein; for an accounting of the oil and gas removed therefrom by Appellees; for the appointment of a Receiver; and for general relief.

The motion to dismiss is in the nature of a general demurrer for lack of equity and failure to state any facts sufficient to entitle the plaintiff to any relief. (Record, page 50).

The memorandum decision of the Court below is shown in full at pages 63-64 of the record and specifically follows a case decided by the Supreme Court of Oklahoma entitled "*Scioto Oil Company* v. *O'Hern*, 169 Pac. 483."

## ASSIGNMENT OF ERRORS

The following errors are assigned (Record, pages 75-76):

I.

"That said Court erred in holding that the Secretary of the Interior had jurisdiction and authority to approve, after the death of the full blood Creek Indian, allottee, the oil and gas mining lease entered into between said allottee and the respondents prior to the death of said allottee.

II.

Said Court erred in holding that the heirs of said deceased full blood Creek Indian, took the lands of said allottee subject to the unapproved oil and gas mining lease made by the allottee during her lifetime.

III.

Said Court erred in holding that the Act of Congress of March 1, 1907, providing that "the filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee Indian Territory, shall be deemed constructive notice," was not repealed and superseded by the Act of Congress authorizing the admission of the State of Oklahoma into the Union as a Sovereign State, effective November 16, 1907.

IV.

Said Court erred in holding that the recording laws of the State of Oklahoma with reference to the recording of in-

struments relating to real estate, did not apply to departmenal oil and gas mining leases, after the formation of said State.

V.

Said Court erred in holding that the filing of the oil and gas lease, claimed by Respondents, with the United States Indian Agent, Union Agency at Muskogee, Oklahoma, on the 5th day of January, 1915, was constructive notice thereof.

VI:

Said Court erred in sustaining Respondent's Motion to dismiss Plaintiff's petition.

VII.

Said Court erred in affirming the judgment of the District Court of the United States for the Eastern District of the State of Oklahoma.

VIII

Said Court erred in dismissing plaintiff's petition.

IX.

Said Court erred in rendering judgment in favor of Respondents and against the Plaintiff.

*Wherefore,* the plaintiff prays that the order and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, be reversed, and that said Court be ordered to enter an order and judgment overruling the Respondents' motion to dismiss, and that said Court be further directed and ordered to re-instate said cause and the petition of the plaintiff so dismissed in said Court and in the United States Court for the Eastern District of Oklahoma."

GEO. T. BROWN,
C. P. CHENAULT,
*Attorneys for Plaintiff.*

## ARGUMENT

From the above and foregoing, it is apparent, that there are involved in this appeal, the following questions of law, to-wit:

**First.**

**Did the Secretary of the Interior have authority to approve —after the death of Jennie Samuels and after her allotment had descended to her heirs free from restrictions against alienation—the proposed oil and gas mining lease, executed by her during her lifetime?**

**Second.**

**Was the filing of the Departmental oil and gas mining lease with the Superintendent for the Five Civilized Tribes, under date of January 5, 1915, for the purpose of approval or rejection, constructive notice to the purchaser of the oil and gas mining lease from the heirs of said decedent after the death of the allottee; and as a corollary thereto?**

**Third.**

**Even had the Secretary of the Interior such power to approve said lease after the death of the allottee, is the Appellant an innocent purchaser, for value, without notice thereof?**

**First Proposition.**

From an examination of the terms of said Departmental oil and gas mining lease as shown in full at pages 53-59 both inclusive, of the transcript of record, it appears that the lease provides in express terms as follows, to-wit:

1. That it shall extend "*for the term of ten years from the date of the approval hereof by the Secretary of the Interior* * * *".
2. "Before this lease shall be in force and effect, the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior * * *".
3. "IN THE EVENT RESTRICTIONS ON ALIENATION SHALL BE REMOVED FROM ALL THE LEASEHOLD PREMISES, THIS LEASE SHALL



# CARD 2

BE RELEASED FROM THE SUPERVISION OF THE SECRETARY OF THE INTERIOR, SUCH RELEASE TO TAKE EFFECT WITHOUT FURTHER AGREEMENT FROM THE DATE SUCH RESTRICTIONS ARE REMOVED, AND THEREUPON THE AUTHORITY AND POWER DELEGATED TO THE SECRETARY OF THE INTERIOR, AS HEREIN PROVIDED, SHALL CEASE * * *".

The allottee, Jennie Samuels, died intestate, seized and possessed of the lands in controversy, on the 11th day of October, A. D., 1915, leaving surviving her as her heirs at law, two full-blood Creek Indian citizens, to-wit: Feney Rogers and Lina White. These heirs under the respective dates of December 6, 1915, and December 27, 1915, executed the oil and gas leases under which the plaintiff claims, and both of which said leases were duly approved by the County Court having jurisdiction of the estate of said decedent, in accordance with the provisions of the Act of Congress of May 27, 1908. Prior to which said dates, and to-wit, on October 21, 1915, WHICH WAS AFTER THE DEATH OF SAID ALLOTTEE, the Department of the Interior attempted to approve the oil and gas lease executed by said allottee during her lifetime, as aforesaid. Thereafterwards, to-wit, under date of August 10, 1916, this lease was filed for record in the office of the County Clerk of Tulsa County, Oklahoma. The leases under which plaintiff claims were filed for record prior to said August 10, 1916.

It is of course admitted, that the Secretary of Interior acting through the United States Indian Superintendent for the Five Civilized Tribes, has jurisdiction and control over the leasing of restricted Indian lands for oil and gas mining purposes. The point which we earnestly contend for is, however, that the Secretary of the Interior has absolutely no supervision or jurisdiction whatsoever over inherited Indian

lands, since the taking effect of the Act of May 27, 1908, Sec. 9 of that act provides as follows:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."
> (35 Stat. L. 312).

The language of this act operates to divest the Department of the Interior of all jurisdiction over inherited full-blood Indian lands, and in effect, provides that the proper County Court of the State of Oklahoma, must approve or disapprove oil and gas leases covering such lands inherited by such heirs who are full-bloods. As to all other heirs no approval is necessary. While it is true that the several County Courts for this purpose, may be deemed to be Federal Agencies, yet tney are distinct and separate arms of such agency, as distinguished from that of the Secretary of the Interior. Therefore, even should it be held that the lease executed by Jennie Samuels be subject to approval by a Federal Agency, after her death, it must certainly follow that such approval under the express terms of the above Act of Congress must be that of the County Court having jurisdiction of said decedent's estate, and not by the Secretary of the Interior. Suppose the heirs were mixed-bloods, could it then be said that the Department would have any jurisdiction after the death of the allottee?

In this connection, it is a well known fact that it is a common practice for conveyances oi inherited full-blood Indian lands made prior to the Act of May 27, 1908, which were by virtue of the Act of April 26, 1906, required to be approved by the Secretary of the Interior, but not in fact acted upon by the Secretary prior to July 27, 1908, to be approved thereafterwards by the proper County Court. In

other words, the approving power for all instruments, executed by full-blood Indian heirs, no matter what the date thereof, was the proper County Court, after the Act of May 27, 1908, became effective. This reasoning applies with equal force where the instrument in question is to be asserted against the heirs, although in fact signed by the ancestor. *Particularly is this true where the instrument by its terms provides that it shall not become effective until such approval.* In such a case, the instrument in question is deemed to bear date as of such approval. The Supreme Court of the State of Oklahoma has even held that in such a case, if the County Court should approve a deed prior to the approval of one executed by the same heir by the Secretary of the Interior, the former instrument would take precedence over the latter.

*Moffet* v. *Conley, infra.*

The general rule is that the date of an instrument is not the arbitrary date set forth in the instrument itself., but the day and date on which it is to become effective. Cyc., in defining the word date, says:

> "In letters, the time when they are written or sent; in deeds, contracts and wills and other papers, the time of execution and usually the time from which they are to take effect and operate on the rights of persons."
> 13 Cyc., p. 259.

> "The real date of a deed is the time of its delivery."
> Devlin on Real Estate, Third Ed. Vol. 1 Sec. 177.

And again the same authority says at Sec. 178:

> "As a general principle, a deed does not take effect from its date, but from its delivery; but the presumption is, it was delivered on the day of its date, and the date may be contradicted as not essential. It is always competent to show that the date inserted in the deed was not the date of its delivery."

Now, in the case at bar, it is specifically provided in the

instrument in question that it shall not become effective until some day subsequent to the date of its execution, to-wit, on the day it is approved by the Secretary of the Interior. Prior to that approval, however, the proposed lessor died, and the lands in question descended to her heirs, free from all restrictions against alienation, and the Secretary of the Interior thereupon lost his jurisdiction not only by virtue of the terms of the Act of Congress of May 27, 1908, as aforesaid, but also *by express stipulation in the instrument to that effect.*

The United States District Court for the Eastern District of Oklahoma has held, in construing the Act of Congress of May 27, 1908, that the terms of that Act applied as of the date of any given instrument.

*Harris* v. *Gale*, 188 Fed. 712.

The Supreme Court of Oklahoma has likewise placed the same construction upon said Act.

*MaHarry* v. *Eatman*, 29 Okla. 46, 116 Pac., p. 935;
*McCosar* v. *Chapman*, 157 Pac. p. 1059 (Okla.);
*Nicholas* v. *Cornelius*, 152 Pac. p. 831 (Okla.);
*Sampson* v. *Staples*, 149 Pac.. p. 1094 (Okla.).

We think that aside from the express stipulation in the lease providing that the authority of the Secretary of the Interior shall cease upon the removal of restrictions of said lands, it necessarily follows from the above authorities that the approving agency of the lease in question was not the Secretary of the Interior, but the proper County Court.

The Supreme Court of the State of Oklahoma has held in a late case that the general terms and provisions of a given Act of Congress, supersede the effect of a special order of the Secretary of the Interior made pursuant to legislative authority. In that case, the Secretary of the Interior made an order removing the restrictions from certain Indian

lands, which order provided by its terms that it should not became effective until thirty days after its date. The order in question was made April 21, 1906, and had not therefore taken effect on April 26, 1906, and the Act of Congress of that date extending restrictions upon the alienation of full-blood Indians for twenty-five years suspended the order of the Secretary of the Interior and such order was indefinitely postponed and therefore, never took effect.

*Deere* v. *Neumeyre*, (Okla.) 154 Pac. p. 350.

Following out the same line of reasoning, it is apparent that the purported order of the Secretary of the Interior approving the lease of Jennie Samuels was of no effect because by the terms of the instrument and of the Act of May 27, 1908, his authority to act in the premises was superseded upon the death of the allottee.

It is also of interest to note that by the terms of section 2 of said Act of May 27, 1908, it is specifically therein provided that the Secretary of the Interior shall have power to approve oil and gas mining leases covering RESTRICTED LANDS ONLY. The language of that section with reference thereto is as follows:

> "That leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior * * *".

The lands in question were not "RESTRICTED LANDS" within the purview of this Act. In the case of *Harris, et al.*, v. *Bell et al.*, not yet officially reported, but which may be found in Vol. 13, No. 20 of the Oklahoma Appellate Court Reporter, at page 383 thereof, this Court held that "Restricted Lands" does not include or affect inherited lands. In construing Section 6, of the Act of 1908, the following language is used:

> "Section 6 of the Act of 1908 subjects the persons and property of minor allottees to the jurisdiction of

the probate courts of the state, and in a proviso says, 'no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise.' One ground on which the guardian's sale on behalf of the minor heirs, Amos and Elizabeth, is assailed is that it was in violation of this proviso. But in our opinion the proviso does not include or affect inherited lands. It refers, as a survey of the act shows, to lands of living minor allottees and not to lands inherited from deceased allottees. Section 9 expressly recognizes that the latter may be sold, and this proviso cannot be taken as prescribing the contrary. The word 'living' evidently is intended to mark the distinction. What is intended is to make sure that minor allottees receive the benefit of the restrictions prescribed in Section 1, and not to impose others. Apparently it was apprehended that the general language of Section 6 might be taken as enabling probate courts and guardians to sell without regard to those restrictions, and the office of the proviso is to prevent this. So understood, it is in accord with the general scheme of the act and not in conflict with any other provision."

How can it then be said that in the power conveyed by Section 2, supra, the Secretary of the Interior could approve the lease in question, when Section 9 of the same act placed that power with the Courty Court?

It is apparent that this Act of Congress is intended to supplant and supersede all previous congressional legislation relating to the same subject, and is also intended as a general law designating just what are and what are not restricted Indian lands, and defining the respective powers under which the several County Courts of the State of Oklahoma and the Secretary of the Interior are to perform their respective duties.

*We believe, therefore, that when Jennie Samuels died, the lease in question not having then become effective, the lands immdiately descended to her heirs unburdened by said proposed lease, and that the subsequent approval there-*

*of by the Department of the Interior, without jusisdiction so to do, was an absolute nullity.*

The circumstances are analogous to a case where there were negotiations for a contract between two parties, by the terms of which contract, it was therein provided that the same should not take effect until approval by a certain designated individual, and before such approval, one party to the contract dies and the subject matter of the contract descends to his heirs. Under such circumstances, it would not for a moment be contended that the party designated to approve such contract could thereafterwards proceed to approve same and make it effective between the one party and the heirs of the other party, who had no notice thereof, nor took any part therein.

The United States cases cited by appellees in the court below in support of said motion to dismiss, to-wit, *Pickering* v. *Lomax* and *Lykins* v. *McGrath*, are not in point. In both of these cases the *same Governmental Agency was authorized to approve the particular deed in question, after the death of the grantor as before the death.* In the case at bar, such is not the case. The approving agency was changed from the Secretary of the Interior to the County Court. Furthermore, both of these cases were where deeds had been executed, acknowledged and *delivered to the grantee* and in each case the court specifically found that the Indian had received his consideration. There remained but the ratification and approval of the deed by the governmental official. In the case of leasing restricted Indian lands for oil and gas mining purposes, *there is no lease* until the same is approved by the Secretary of the Interior, and the proposed lessee complies with certain regulations and rules of the Department concerning same. In fact, the bonus money, if any, is deposited in escrow. Moreover, as above mentioned, by express terms, the instrument provides *that it shall not be in effect until approved by the Secretary of the Interior.*

Therefore, the parties to the proposed lease were not in the same relation to each other as in the case of a deed from an Indian which would require the approval of the President before it became valid. The approval in the case of a lease does not relate back to the date inserted in the instrument, as in the case of a deed, *but the lease by express terms commences with the date of that approval.*

In the leading case upon which all the others are based, to-wit: *Pickering* v. *Lomax*, where the doctrine of principal and agent is applied, the court say:

> "So far as the main question is concerned, we know no reason why the anology of the law of principal and agent is not applicable here, viz., that an act in excess of an agent's authority, when performed, becomes binding upon the principal, if subsequently ratified by him. The treaty does not provide how or when the permission of the President shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered. *Doe* v. *Beardsley*, 2 McLean 412. It is doubtless, as was said by the Supreme Court of Mississippi in *Marmon* v. *Partier*, 1p Sm. & Marsh, 425, 427, 'a condition precedent to a perfect title' in the grantee; but the neglect in this case to obtain the approval of the President for thirteen years, only shows that or that length of time, the title was imperfect, and that no action of ejectment would have lain until the condition was performed. Had the grantee, the day after the deed was delivered, sent it to Washington and obtained the approval of the President, it would be sticking in the bark to say that the deed was not thereby validated. A delay of thirteen years is immaterial, provided, of course, that no third parties have in the meantime legally acquired an interest in the lands."

*Pickering* v. *Lomax*, 145 U. S. 310, 36 L. ed. 716.

In *Almeda Oil Company* v. *Kelley*, the doctrine of relation as applied by the court was expressly restricted TO THE PARTIES TO THE CONTRACT. In that case, the

Indian was still living and the only ground upon which he sought to defeat the lease in question was that since the making thereof and the filing of same with the Indian agent, the Indian whose restrictions had been removed in the meantime had "changed his mind." In this connection the court say:

> "It occurs to us that if the removal of restrictions on the allottee's complete right to lease would have any effect whatever, it would be to render the contract of the parties complete, to be annulled only on or for some of the grounds under which equity gives relief."
>
> *Almeda Oil Company* v. *Kelley*, 35 Okla. 525, 130 Pac. 931.

There might be some merit in the contention of appellees if the instrument in question was completely executed and if the Secretary of the Interior still remained the approving agency after the Act of May 27, 1908, as before that act. Such was the case in both of the United States cases above, to-wit: *Pickering* v. *Lomax* and *Lykins* v. *McGrath*. Now when the Department of Interior undertook to act on the lease of Jennie Samuels, *the only power or authority authorized by the Act of Congress to approve any conveyance of any interest in said land was the County Court having jurisdiction of the estate of said decedent.* This court will take judicial notice of the fact that it is the established practice and custom of the Department of the Interior to release all jurisdiction of Indian lands covered by Department leases, just as soon as said lands have by operation of law become unrestricted lands. In fact the lease so provides, and we verily believe that had the attention of the Secretary been called to the fact of the death of the allottee, before his approval of said lease, he would have declined further jurisdiction in the premises.

We therefore most respectfully submit that the attempted and purported approval of the lease in question by the Department of the Interior after the death of said allot-

tee, Jennie Samuels, and after the lands had descended to her heirs, free from all restrictions, was without jurisdiction and had no effect whatsoever upon the instrument in question, and that, therefore, said lease never having become effective during the lifetime of the proposed lessor, is an absolute nullity.

If we be correct in our contentions on this point, then of course, it is unnecessary for the Court to pass upon Proposition No. Two.

**As to Propositions Nos. Two and Three**

It appears from the facts as above set forth, that the appellant and its assignors acquired its leases from the heirs of the decedent, for value, without actual notice of the existence of the alleged Departmental oil and gas mining lease executed by Jennie Samuels, and that the latter was not filed for record in the office of the county clerk until after appellant's interest had been so acquired and its leases filed Therefore, under the law as announced in *Pickering* v. *Lomax, supra*, and followed by the Supreme Court of Oklahoma, in *Moffet* v. *Conley, infra,* if the appellant can be said to be an innocent purchaser for value without notice of the existence of said alleged Departmental lease, even though it be held to be valid, as between the parties, it is a nullity as against said appellant. Appellees rely upon a section of an Indian appropriation Act of March 1, 1907, providing:

> "The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, at Muskogee, shall be deemed constructive notice."

(34 Stat. L. 1015).

The decision of the Supreme Court of the State of Oklahoma, followed with approval by the Court below, in its memorandum decision, was so decided by the Supreme Court of the State on rehearing. Prior to which, however, that

same Court had, under date of January 2, 1917, rendered a decision in the same case holding that by reason of the intervention of Statehood, said Act of March 1, 1907, *supra*, was superseded and was not in effect since the formation of the State of Oklkahoma. The language of the Supreme Court upon this point in the first opinion is as follows:

> "This brings us to the question of law involved, in the main, the question whether the filing of the lease in the office of the Indian agent, imparted constructive notice to the world. The trial court held, and we think correctly, that it did not. Counsel for plaintiff in error contends that the court erred therein, in that the Act of March 1, 1907, (34 Sat. 1026) which provides that 'the filing heretofore, or hereafter, of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice,' was not repealed nor abrogated by section 21 of the Enabling Act, which follows:
>
> "'And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union, shall be in force throughout said state, except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force within said state as elsewhere within the United States.'
>
> "And section 2 of the schedule of our state constitution, which was adopted and became effective November 16, 1907, which section reads as follows:
>
> "'All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which were not repugnant to the constitution, and which were not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitations, or are altered or repealed by law.'
>
> "It is plain that these sections of the Enabling Act, and the constitution of the state, put in force all laws of the territory not repugnant to nor locally in conflict therewith; bearing in mind these sections, our attention is called to section 1154, Rev. Laws 1910, which was in

force in Oklahoma Territory at that time, which reads as follows:

"'* * * no deed, mortgage, contract, bond, lease nor other instrument relative to real estate * * * shall be valid as against third persons unless acknowledged and recorded as herein provided.'

"It cannot be said that this provision of the statute in reference to filing the recording conveyances, is repugnant to the constitution, nor locally inapplicable to matters under construction here. Section 1155, Rev. Laws 1910, provides for constructive notice, and states clearly what shall be constructive notice. The section is as follows:

"'Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law, from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors.'

"This section was also in force at the times herein mentioned. There seems to be no exception to the full application of these statutes, and, therefore they must be applicable to Indian lands, the same as all other lands of the state—especially must this be true as to the Indian lands from which all restrictions have been removed, as is the case with the land involved here. By the Enabling Act and constitution of this state, Albert Cooper and his brothers were made citizens of the state and of the United States, and they held this land free from any and all restrictions against alienation, the same as any other citizen of the state. They sold the land to defendant in error for a valuable consideration. He was a bona fide purchaser without notice of claims of the plaintiffs in error, and is entitled to the relief prayed for, so far as it relates to the cancellation of the lease and quieting of the title. In a recent case, *Moffet et al* v. *Conley, Admx.*, being No. 5825, not yet officially reported, 163 Pac. 118, the fifth and sixth syllabi are as follows:

"'5. A conveyance by an adult full-blood Indian heir, of inherited allotted lands, made August 9, 1907, was as to a portion of the lands attempted to be con-

veyed, approved by the Secretary of the Interior April 13, 1911, pursuant to the Act of April 26, 1906. On September 25, 1908, said heir sold and conveyed said land to a third party, and on October 6, 1908, said sale and conveyance was approved by the County Court having jurisdiction of the settlement of the estate of the deceased ancestor, as provided in section 9 of the Act of May 27, 1908, (35 Stat. at L. 312 ch. 199). *Held*: That the rights of the second purchaser having intervened, and the first deed being without force until approved, the subsequent approval thereof was without effect upon the title of the grantee in the second deed.

" '6. The conveyance through which the intervenor claimed an equitable title to lands as against both the grantee named in the deeds, and his subsequent grantee, not being approved by the Secretary of the Interior except as to a part of the lands, and that after the rights of said intervenor, being dependent thereon, must fall with the legal title.' "

While we realize that the above quoted language is not the law of that case by reason of it having been withdrawn on rehearing, yet we are of the humble opinion that this first decision is more logical and reasonable and is better law than that rendered in the same case on rehearing, and we are setting out as an appendix hereto, the first decision in full. Moreover many of the Constitutional and Statutory provisions of the State of Oklahoma, relied upon by us, are also therein quoted in full

The case of *Moffet* v. *Conley*, cited in the *O'Hern* case, was an opinion rendered by Mr. Justice Sharp of the Supreme Court of the State of Oklahoma, and in which the facts were as follows: One Jennie Hickory, a full-blood Creek heir of her intestate, in August, 1907, conveyed said lands to one Skinner, which conveyance was approved by the Secretary of the Interior in April, 1911. In the meantime, to-wit, in September, 1908, she executed another deed, conveying the same lands to one Lewis, which latter deed was in October, 1908, approved by the County Court of the

county having jurisdiction of the estate of said decedent, pursuant to the Act of Congress of May 27, 1908. In this connection, it must be borne in mind that at the time of the execution of her deed to Skinner, the County Court had no authority to approve the deed. In fact, at that time, there was no County Court. Judge Sharp after finding that the Secretary of the Interior had power to approve the Skinner deed, holds, however, that the execution of the Lewis deed and the approval of it by the County Court in the interval between the execution of the Skinner deed and the approval thereof by the Secretary of the Interior, operated to render the second deed valid. In the opinion he says:

> "It will not do to say that the approval of the Secretary of the Interior of the former deed to Skinner, long subsequent to the conveyance to Lewis, defeats the latter's title. Until approved, the Skinner deed was without legal effect, and prior to the date of its approval, the righs of Lewis intervened."
>
> *Moffet* v. *Conley*, 163 Pac. p. 118.

Counsel for appellees have referred to the recent case of *Orphans Home* v. *McClendon*, for authority to the effect that the Acts of Congress supplant the laws of Oklahoma in relations to Indians; that certain state laws which are applicable to every other citizen are not in force as against or pertaining to the Indians of the Five Civilized Tribes. The syllabus of this case upon this point is as follows:

> "Our statute on champerty does not apply to restricted Indian lands. Congress has reserved the conclusive right to control the sales, and prescribe the conditions under which title to these lands may pass. And conveyance of such lands made in compliance with the Acts of Congress, and the rules and regulations of the Department of the Interior, carries title to such lands, as against the world."

We have no quarrel whatsoever with this statement of the law. Every lawyer who is in the least acquainted with

the decisions of the courts in this jurisdiction will readily admit that certain general laws of a general nature and character do not apply to restricted Indian lands It is readily admitted that under the terms and provision of the Enabling Act, pursuant to which the Constitution of Oklahoma was formed, the power of the Congress of the United States to legislate as to the Indian wards and their property was expressly reserved. No citation of authority, other than the plain and unambiguous language of these two documents, is necessary to establish this proposition. Section 1 of the Enabling Act provides:

> "That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or limit or effect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed."

34 Stat. L. 267, (Bunn's Ed. Secs. 502, 503).

Sec. 3, Art. 1, of Constitution of Oklahoma, provides:

> "And all laws in force in the Territory of Oklahoma at the time of admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

34 Stat. L. 277, (Bunn's Ed. Sec. 538.)

Neither is the question of the power and effect of the several Federal Acts for registration of land titles involved herein. Answering this same objection, the United States

Circuit Court of Appeals for the Eighth Circuit in the oft cited and quoted case of *Shulthis* v. *McDougal* say:

> "This is not a case in which the title to the land is in the Government and a proceeding is pending before the Land Department for its acquisition under public land laws. The title to the land was in Berryhill and the object of the supervisory approval of the Secretary of the Interior was simply to protect the Indian against the improvement disposition of his property."

*Shulthis* v. *McDougal,* 170 Fed. 529.

It will be remembered that *Shulthis* v. *McDougal* was decided prior to the enactment by Congress of the Act of March 1, 1907, *supra,* and that the question therein involved was whether or not such a lease was subject to the registration laws then in force in the Indian Territory, and that the question was there answered in the affirmative. Therefore, the only thing now to determine upon this phase of the case is, whether or not the Act of Congress of March 1, 1907, was or was not supplanted and superseded by the terms and provisions of the Enabling Act and the Constitution of the State of Oklahoma. That inquiry being answered in the affirmative, it will follow as a matter of course that the lease in the case at bar must have been filed in the office of the county clerk of Tulsa County, Oklahoma, in accordance with the registration laws of the State of Oklahoma, in order to constitute constructive notice.

*Shulthis* v. *McDougal, supra;*

Section 1154-1155, Rev. Laws 1910 (quoted in appendix.)

It must also be kept in mind at the time of the enactment of the Act of March 1, 1907, the Indian Territory was then an unorganized territory and directly subject to the legislative enactments of the general Congress of the United States, and pursuant to which, this piece of legisla-

tion was enacted. Subsequently, however, by the terms and provisions of the Enabling Act and the Constitution of the State of Oklahoma, made in pursuance thereof, all of which became effective November 16, 1907, this same legislative body, to-wit, the Congress, chose to provide that the laws governing registration of instruments, such as the one herein under discussion, should be that of the Territory of Oklahoma, now section 1154 and 1155, Revised Laws 1910, It is not a question of repeal by implication, but by a special legislative enactment of Congress, the language being:

> "And all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state except as modified or changed by this act or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."
>
> (34 Stat. L. 277).

It is clear throughout the Enabling Act that it is contemplated that upon the formation of the State of Oklahoma into the sisterhood of states, the laws governing the rights, government, duties and obligations of the citizens of the new state as to their persons and property, should be clearly defined in detail, and it is equally apparent that up to that point all former legislation on the part of Congress as to the people living in this Indian country had been more or less temporary, and that the legislation incident to statehood was intended to be complete and of a general character, thereby superseding, by express provision, all previous Acts of Congress on the same subjects covered by the Enabling Act. It is specifically provided in the Enabling Act how the delegates to the Constitutional Convention should be elected, and the Constitution enacted pursuant to the Enabling Act provides in detail the various state and county officers, and their respective duties. The Enabling Act limits

and defines to a certain extent what provisions may or may not be incorporated in the state constitution, and in a general way outlines a form of government to be provided for, leaving to the Constitutional Convention the formation of the Constitution. Section 21 provides for a full complement of state officers, and concludes with the provision that upon the formation of the state "all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union, shall be in force throughout the state except as modified or changed by this act, or by the constitution of the state, and the laws of the United States not locally inapplicable, shall have the same force and effect within said state as elsewhere within the United States." The state constitution further provides:

> "That laws of a general nature shall have a uniform operation throughout the state, and where a general law can be made applicable, no special law shall be enacted."
>
> Sec. 59, Art. 5 (Bunn's Ed., Sec. 132.)

And also:

> "All laws in force in the Territory of Oklahoma at the time of admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be exended to and remain in force in the State of Oklahoma until they expire by their own limitation, or are altered or repealed by law."
>
> Sec. 2, Schedule (Bunn's Ed., 451.)

The constitution enumerates certain specific Acts of Congress in force in the Indian Territory prior to statehood, which might be said to be local and special in their character, and provides for their continuance in effect in the state.

> "The Act of Congress entitled 'An Act for the protection of the lives of miners in the territories,' approved March 3, 1891, and the Act of Congress entitled 'An Act to amend an act entitled 'An Act for the pro-

tection of the lives of miners in the territories'," approved July 1, 1902, are hereby extended to and over the State of Oklahoma until otherwise provided by law: *Provided*, That the words, governor of the state, are hereby substituted for the words, 'governor of such organized territory,' and for the words 'Secretary of Interior,' wherever the same appear in said acts, and the words, 'Chief Mine Inspector,' for the words 'Mine Inspector,' wherever the same appear in said acts. The Chief mine inspector shall also perform the duties required by laws of the Territory of Oklahoma of the territorial oil inspector until otherwise provided by law."

Sec. 13, Schedule (Bunn's Ed., 462.)

If it had been intended to continue in effect the local and special Act of March 1, 1907, *supra*, it would have been easy enough to have included that act with the others enumerated in said section 13, of the schedule.

Finally, the constitution and the ordinance irrevocably accept the terms of the Enabling Act.

Section 28, Schedule (Bunn's Ed., 477 and 497).

In the light of these constitutional provisions there is no doubt but that the authority of Congress still exists with reference to the Indians and their property, in so far as the same or any part thereof may be subject to restrictions from alienation. It is not believed, however, that this reservation in the Enabling Act would confer upon Congress the authority to legislate as to any former member of the Five Civilized Tribes who is made a citizen of the State of Oklahoma, and who holds his lands free from any restriction against alienation. Furthermore, the matter of providing a system of registration or recording acts is peculiarly the exercise of a state sovereignty, and could not in any sense be said to be legislation affecting an Indian or his property. Whether this Act of March 1, 1907, *supra*, was or was not constitutional prior to statehood, is a debatable question, but

one not in issue at this time. All that we are now concerned with is the status of this act since the formation of the Sate of Oklahoma.

There is nothing in the Enabling Act, constitution or the registration laws of the State of Oklahoma adopted thereby, excepting from the full force and effect of said registration laws all instruments therein contemplated, no matter by whom executed.

The language of section 21 of the Enabling Act is unequivocal. There are only two exceptions to the applicability of the Oklahoma Territory laws. One where modified or changed by the Enabling Act; and the other where modified or changed by the constitution. Neither the constitution nor the Enabling Act made any provision for continuing any registration law in effect in Okklahoma other than the registration laws of the Territory of Oklahoma.

Bledsoe's Indian Land Laws, 2nd Ed., Sec. 233.

It is not then a question of repeal by implication, for the language of the Enabling Act specifically provides that all laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, not repugnant to the constitution, and not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma.

Now among the laws extended in the State of Oklahoma by virtue of the above and foregoing provision, were sections 1154 and 1155, Revised Laws of 1910, providing what instruments should be recorded in the office of the register of deeds in order to constitute constructive notice, and in which is included an oil and gas mining lease, no matter by whom that instrument be executed. How can it be said that these recording statutes do not apply to instruments executed by Indian citizens of the state? Furthermore, it is perfectly apparent that the Congress of the United States

has recognized the fact that the recording laws of Oklahoma applied to Departmental leases, for when the Act of May 27, 1908, *supra*, was enacted, by section 3 thereof, it is provided as follows:

> "That the owner or owners of any allotted land from which restrictions are removed by this act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed, under or by authority of any Act of Congress, shall have power to cancel and annul any oil, gas mining lease on said lands whenever the owner or owners of said lands, and the owner or owners of the lease thereon agree in writing to terminate said lease, and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing cancelling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, AND THE SAME SHALL BE RECORDED IN THE COUNTY WHERE THE LAND IS SITUATED."

*Why this provision for recording a release of a Departmental lease in the county where the lands are situate, unless it was contemplated by Congress that the oil and gas lease to be cancelled should likewise have been recorded in said office?*

The case of *Anicker* v. *Gansburg*, 226 Fed. page 176, was not a case decisive of, or even involving the question here raised. In that case, an Indian owner of restricted lands had given a lease thereon to two parties, both of whom had filed same with the Indian Agent. One lease was approved and the other disapproved, and this Court there held that the discretion of the Secretary of the Interior in his ruling upon said leases was not abused. No question whatsoever was raised as to whether or not the Act of March 1, 1907, *supra*, was still in effect, both parties apparently relying on same and treating said act as still in force and effect.

Neither does the doctrine of *lis pendens* apply, and we do not deem it necessary to enter into a discussion thereof, further than to quote from *Shulthis* v. *McDougal*, at page 537 thereof:

> "This decision in our judgment controls the question we are now considering, and under it the lease was subject to the registration law in force in the territory, and should have been recorded in order to protect the interest which it granted as against a good faith purchaser."
>
> *Shulthis* v. *McDougal*, 170 Fed. 529.

## CONCLUSION

Therefore, it follows from the above and foregoing, that even if this Court should hold that the Act of March 1, 1907, *supra*, is still in full force and effect, yet the Court must further find that the Secretary of the Interior had power to approve the lease in question after the death of the allottee and the descent of her estate, free from restrictions, to her heirs. If the Court should decided either of these question in favor of the Appellant, then the judgment of the Court below should be revised.

All of which is respectfully submitted,

JOHN DEVEREUX,
*Counsel for Appellant.*

# APPENDIX

*Scioto Oil Co., et al* v. *O'Hern.*

(Supreme Court Commission, Division Number Six
Jan. 2, 1917.)

(Time for filing petition for rehearing expires Jan. 17, 1917),

7055—The Scioto Oil Company, a corporation, and John M. Ingram v. P. S. O'Hern.

SYLLABUS

1. RECORDS—SECTION 1154, R. L. 1910, APPLIES TO CITIZENS OF CREEK NATION. Section 1154, Rev. Stat. 1910, Ann., which provides that "no deed, mortgage, contract, bond, lease or other instrument relating to real estate * * * shall be valid as against third persons unless acknowledged and recorded as required by law," was put in force in the State of Oklahoma by Section 21 of the Enabling Act and Section 2 of the Constitution of this State, and is applicable to all duly enrolled citizens of the Creek Nation without regard to quantum of Indian blood, as to the surplus allotted lands of said Nation, and to the same extent and with like effect as is applied to other citizens of the State of Oklahoma and the United States.

2. OIL AND GAS—VALUE OF SAME MAY BE RECOVERED BY OWNER WHERE UNLAWFULLY TAKEN. If oil or gas has been unlawfully and wrongfully taken from the premises of another, the owner has the right to recover the value of the product so wrongfully taken, and the trespasser, or wrong doer, is not entitled to be credited with the expenses of extracting such oil or gas from the ground.

Error from the District Court of Tulsa County, L. M. Poe, Judge.

Action by P. S. O'Hern, as plaintiff, against John M. Ingram and Scioto Oil Company, a corporation, as defend-

ants; judgment for plaintiff, and defendants bring error. Affirmed.

Edw. H. Chandler, John Wheeler, J. P. O'Meara, for plaintiffs in error. Geo. T. Brown, for defendant in error.

ROBBERTS, C. The plaintiff relied upon the following state of facts: The land involved is the southeast quarter of section 12, township 16 N., R. 13 E. I. M., Tulsa County, and was allotted by the Creek Nation of Indians to one Albert Cooper, who was a full-blood citizen of that nation, enrolled Number 1953, being his distributive share of the allotted lands of that Nation, and duly patented to him during his lifetime. He died on the 16th day of September, 1912, leaving two sons, Sam and John Cooper, as his only heirs. Thereafter, on the 27th day of September, 1912, Sam Cooper, being a single man, made, executed and delivered a warranty deed to his undivided one-half interest in said land to one W. W. Fox. The deed contained the usual covenants of warranty, and was approved by the county judge of said county on the first day of October, 1912, as provided by Section 9 of the Act of Congress of May 27, 1908, and filed for record in the office of the register of deeds of said county on the 2d day of October, 1912. On the 2d day of December, 1912, John Cooper and wife deeded his undivided half interest in said land to said Fox, which was approved by the county court of said county, on the same day, and filed for record in the office of the register of deeds, on the 3d day of December, 1912. On the 9th day of December, 1912. Fox and wife conveyed said land to P. S. O'Hern, the defendant in error (plaintiff below), and that deed was filed for record in the office of the register of deeds of said county on December 16, 1912. The plaintiffs in error (defendants below) claim right of possession of said premises under a departmental oil and gas lease, which was executed and delivered by Albert Cooper during his lifetime, August 16, 1912, to one John M. Ingram, and which lease was filed in the office of

the Indian agent at Muskogee on August 23, 1912, pursuant to Act of March 1, 1907, and approved by the Department of the Interior on December 24, 1912.

The oil and gas lease was not filed in the office of the register of deeds until May 8, 1913, and W. W. Fox, the immediate grantor of the defendants in error, had no actual knowledge or notice of said lease at the time he purchased the land from Sam and John Cooper, heirs of the original allottee, Albert Cooper. The Scioto Oil Company became the owner of an undivided half interest in this lease on May 14, 1913, by assignment from John M. Ingram, and June 23, 1913, the Interior Department released all supervision over this land.

Upon these issues, the case was tried to the court without a jury. At the conclusion of the trial, the court made findings of fact and conclusions of law, as follows:

I. "That the land in controversy was allotted to Albert Cooper, a full-blood Indian of the Creek Nation or Tribe of Indians.

II. "That on the 15th day of September, 1912, said Albert Cooper died intestate, leaving surviving him Sam Cooper and John Cooper, his brothers.

III. "That prior to the death of the said Albert Cooper, to-wit, on August 16, 1912, he made, executed and delivered to the defendant, John M. Ingram, a departmental oil and gas lease covering the lands in controversy.

IV. "That on August 23, 1912, the said John M. Ingram caused said lease to be filed in the Indian agent's office at Muskogee.

V. "That on September 27, 1912, one of the heirs, Sam Cooper, made, executed and delivered to W. W. Fox a warranty deed covering his interest in and to said premises.

VI. "That said deed was approved October 1, 1912.

VII. "That on November 21, 1912, the said W. W. Fox entered into an executory contract of sale and purchase for the land described in the petition for a consideration of $3,600.

VIII. "That one thousand dollars of said sum was by the plaintiff on that date paid to the said W. W. Fox.

IX. "That by the terms of said contract the remainder of the consideration was to be paid when Fox perfected the title to the land in controversy and furnished an abstract of same showing the same to be perfected, within sixty days from the date thereof.

X. "That on December 2, 1912, the joint heir, John Cooper, made, executed and delivered to W. W. Fox his warranty deed covering his interest in said land.

XI. "That on the same date the same was approved as required by law.

XII. "That on December 9, 1912, W. W. Fox made, executed and delivered to the plaintiff, P. S. O'Hern, his waranty deed, covering the land in controversy.

XIII "That on December 24, 1912, the departmental lease to John M. Ingram which had theretofore been executed, to-wit, on August 16, 1912, was by the department of the interior approved.

XIV. "That on May 14, 1913, John M. Ingram duly assigned an undivided one-half interest in said lease to the Scioto Oil Company.

XV. "That on June 23, 1913, the department of the interior relinquished supervision over said property.

XVI. "That on December 16, 1912, the plaintiff paid the remainder of the purchase price provided for in the executory contract of sale.

XVII. "That said W. W. Fox purchased the land from

the heirs of Albert Cooper, deceased, without actual knowledge of said oil and gas lease.

XVIII. "That the said plaintiff, P. S. O'Hern, paid the $1,000 under the executory contract of sale without actual knowledge of said oil and gas lease.

XIX. "That the said P. S. O'Hern, prior to the payment of the remainder of the consideration for said land came into possession of facts which were sufficient to put him upon inquiry as to the outstanding incumbrances against said land.

XX: "That on the 16th day of December, 1912, the plaintiff caused to be written a letter to the Indian agent inquiring as to the legal status of said land.

## CONCLUSIONS OF LAW.

I. "The court is of the opinion that the Act of March 1, 1907, providing for the filing of leases in the office of the United States Indian agent, and that the same should be constructive notice to all parties thereafter dealing with he property covered by such lease were superseded by the Constitution and schedule to the Constitution and the laws of Oklahoma Territory extended over and put in force in the State of Oklahoma upon the admission of Oklahoma into the Union of States.

II. "By the said Constitution and the schedule of the same, Oklahoma became an organized sovereign State admitted upon an equal footing with all other States, with the paramount right to legislate for her citizens and the exclusive right to provide what should constitute constructive notice under the recording acts of the State, and that the provision of the Enabling Act which provides that nothing contained in the said Constitution should limit or impair the rights of persons or property pertaining to the Indians of said territories, etc., or to limit or to affect the authority

of the gomernment of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties agreement, law or otherwise which it would have been competent to make if this Act had not been passed, does not interfere with the sovereignty of the State in dealing with the said question of constructive notice, nor are such recording acts in conflict with the provision of the Enablng Act.

III. "Having reached the above conclusion, it follows as a matter of law that W. W. Fox, the plaintiff's grantee, was a bona fide purchaser of the land in controversy and took same without knowledge either actual or constructive of the lease claimed under this action.

IV. "That a purchaser with notice from a purchaser without notice has all the rights of the latter; therefore, it is immaterial as to whether the plaintiff had actual notice of the existence of the lease at the time of the consummation of his purchase, he having purchased from W. W. Fox, who was without notice, either actual or constructive, he took his title free and clear from such incumbrance.

V. "It is immaterial under the conclusion of law reached by the court as to whether the oil and gas lease upon its approval by the Interior Department related back and became effective upon the date of its execution and delivery for the reason that had the same been executed and delivered and approved upon said date and not placed of record at a place required by the laws of Oklahoma and third parties had purchased land in controversy without actual knowledge of said lease, they would have taken the same free and clear of all incumbrances and without constructive notice.

VI. "Where a full-blood allottee of the Creek Nation executes a departmental oil and gas lease upon his allotment and the same is filed with the Indian agent and Department

of the Interior for approval and said allottee dies before the approval of the same by the Secretary of the Interior, leaving two adult heirs surviving him and said land under the law at the time of his death descends free from restrictions upon alienation and his heirs thereafter make, execute and deliver a warranty deed to said land, the party who takes the same without actual or constructive notice of the former lease executed by the allottee prior to his death and before said lease is approved by the Secretary of the Interior, takes title to said land free from the claims of the first lessee.

VII. "Under the above stated facts, the original lease would relate back and the rights of the lessee thereunder would attach on the date of its execution and delivery, subject to the rights of intervening persons who dealt with the subject matter without actual or constructive notice of said lease.

"The case of *Kelly* v. *Almeda Oil Company*, reported in 130 Pac. 933, and *Pickering* v. *Lomax*, reported in 36 Law Ed. 716, U. S. Reports, in my opinion support the doctrine that intervening rights of bona fide third parties who acquire interest in Indian land between the date of the sale or lease of the Indian's land and the date of its approval, are protected. In the Kelly case, the court expressly holds, 'That had it not been for the fact that Kelly had notice of the lease made to defendant, that he (Kelly) would not have been bound thereby.' The same doctrine has also been laid down in the Lomax case above referred to.

"I am therefore of the opinion that the plaintiff in this action should recover, and judgment should be rendered as prayed, and it will be so ordered."

It is apparent from the foregoing that the question of fact involved is the bona fides of the grantees, Fox and O'Hern, and thereby the effect of the filing of the oil and

s lease to John M. Ingram, in the office of the Indian ent on the 23rd day of August, 1912, insofar as it relates the question of constructive notice of said lease.

There is no question as to the priority of the lease, nor to the fact that it was filed in the office of the Indian ent at Muskogee prior to the death of Albert Cooper, and nsequently prior to the conveyance from the heirs, Sam d John Cooper, to W. W. Fox. Upon the question of t, the trial court finds "that W. W. Fox purchased the d from the heirs of Albert Cooper, deceased, without tual knowledge of said oil and gas lease," and P. S. Hern paid $1,000 under the executory contract of sale (for purchase of the land), without actual knowledge of said and gas lease." The rule that this court are fully and arly sustained by the trial court when there is any testiny tending to support them, is too well settled to require ther attention. We will add, however, that to our mind, findings of the court are fully and clearly sustained by evidence, and are approved and adopted here.

"This brings us to the question of law involved, in the main, the question whether the filing of the lease in the office of the Indian agent, imparted constructive notice to the world. The trial court held, and we think correctly, that it did not. Counsel for plaintiff in error contends that the court erred therein, in that the Act of Marsh 1, 1907, (34 Stat. 1026) which provides that 'the filing heretofore, or hereafter, of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, shall be deemed constructive notice,' was not repealed nor abrogated by Section 21 of the Enabling Act, which is as follows:

" 'And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union, shall be in force throughout said State, except as modified or changed by this act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force within said State as elsewhere within the United States.'

"And Section 2 of the schedule of our State Constitution, which was adopted and became effective November 16, 1907, which section reads as follows:

" 'All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which were not repugnant to the Constitution, and which were not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitations, or are altered or repealed by law.'

It is plain that these sections of the Enabling Act, and the Constitution of the State, put in force all laws of the Territory not repugnant to nor locally in conflict therewith. Bearing in mind these section, our attention is called to Section 1154, Rev. Laws, 1910, which was in force in Oklahoma Territory at that time, which reads as follows: " * * * no deed, mortgage, contract, bond, lease nor other instrument relative to real estate * * * shall be valid as against third persons unless acknowledged and recorded as herein provided.' It cannot be said that this provision of the statute in reference to filing and recording conveyances, is repugnant to he Constitution, nor locally inapplicable to matters under construction here. Section 1155, Rev. Laws, 1910, provides for constructive notice, and states clearly what shall be constructive notice. The section is as follows:

" 'Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbranceers or creditors.'

"This section was also in force at the times herein mentioned. There seems to be no exception to the full application of these statutes, and, therefore, they must be applicable to Indian lands, the same as all other lands of the state,—especially must this be true as to the Indian lands from which all restrictions have been removed, as is the case with the land involved here. By the Enabling Act and Constitution of this State, Albert Cooper and his brothers were made citizens of the State and of the United States, and they held this land free

from any and all restrictions against alienation, the same as any other citizen of the State. They sold the land to defendant in error for a valuable consideration. He was a bona fide purchaser without notice of the claims of the plaintiffs inerror, and is entitled to the relief prayed for, so far as it relates to the cancellation of the lease and quieting of the title. In a recent case, *Moffet et al.* v. *Conley, Admx.*, being No. 5825, not yet officially reported, 163 Pac. 118, the fifth and sixth syllabi are as follows:

" '5. A conveyance by an adult full-blood Indian heir, of inherited allotted lands, made August 9, 1907, was as to a portion of the lands attempted to be conveyed, approved by the Secretary of the Interior April 13, 1911, pursuant to the Act of April 26, 1906. On September 25, 1908, said heir sold and conveyed said land to a third party, and on October 6, 1908, said sale and conveyance was approved by the county court having jurisdiction of the settlement of the estate of the deceased ancestor, as provided in Section 9 of the Act of May 27, 1908, (35 Stat. at L. 312, chfl 199), *Held*: That the rights of the second purchaser having intervened, and the first deed being without force until approved, the subsequent approval thereof was without effect upon the title of the grantee in the second deed.

" '6 The conveyance through which the intervenor claimed an equitable title to lands as against both the grantor named in the deeds, and his subsequent grantee, not being approved by the Secretary of the Interior except as to a part of the lands, and that after the rights of third parties had attached the equitable rights of said inervenor, being dependent thereon must fall with the legal title.' "

Although we have not the case before us, the syllabi ch we have quoted above seem to be in point here and sustain the doctrine we here lay down.

We come now to the question as to the amount of re-ery for the oil and gas removed from the premises, which ntiff alleges that defendants appropriated to their own Counsel claims that the court erred in rendering judg-t for the full amount of the oil and gas taken from

the premises without deducting the expense of production or extracting it from the ground. It appears from the record that practically all of the oil and gas was taken from the land after this suit was commenced. The rule contended for by plaintiff in error would apply and should be followed if the product had been taken innocently,—by mistake as to the fact of ownership, and where parties acted in good faith; but the rule, as we understand the law, is that in cases of wilful or negligent trespass, the wrongdoer is not entitled to be credited with the expense of extracting the product, as in this case for instance, where he knew or should have known and had actual notice and warning that the oil and gas belonged to the defendant in error.

*Lamb, et al.* v. *Kinkaid et al.*, 8 Am. & Eng. Ann. Cas. 36;

*Bender et al* v. *Brooks et al.*, 103 Tex. 329, 127 S. W. 169, Ann. Cas. 1913A, 559;

*Thornton on Oil and Gas* (2d Ed.) Sec. 33;

*Turner* v. *Seep*, 167 Fed. 646.

From a careful examination of the authorities, we are of opinion that the proper rule as to the measure of damages was applied by the trial court, and the case should be affirmed in all particulars.

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This is to certify that the undersigned have received a copy of the foregoing brief, and hereby accept service of the same, this ---------- day of December, 1920.

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